IN THE UNTIED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: CERTAINTEED FIBER CEMENT SIDING LITIGATION	:	**CIV. NO. 11-MD-02270-TON**
	:	**MDL DOCKET NO. 2270**
THIS DOCUMENT RELATES TO:	:	
ALL CASES	:	

MEMORANDUM OF LAW IN SUPPORT OF
THE JABRANI OBJECTORS' MOTION FOR AN AWARD
OF ATTORNEY'S FEES AND COSTS AND AN INCENTIVE PAYMENT

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TABLE OF CONTENTS

TABLE OF CONTENTS I

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

I. The Jabranis' Objection Improved the Settlement. 1

II. The Jabranis' Fee Request Is Smaller Than Precedent Permits. 4

III. The Jabranis Are Entitled to Incentive Payments. 7

A. Successful objectors are entitled to incentive payments. 7

B. Class counsel improperly used depositions to attempt to intimidate the Jabranis. .. 7

CONCLUSION 11

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In the face of extraordinary pressure, harassment, and threats that had successfully frightened away every other substantive objector to this settlement, Amirali Jabrani, Janet Jabrani, and Real Homes, Inc. (the "Jabranis") insisted on maintaining their objection to a settlement that would have reverted tens of millions of dollars. As the Jabranis demanded, "The Court should require CertainTeed to declare in open court that it will not seek to reclaim any of the settlement fund; that class counsel asserts that CertainTeed will not is not remotely binding when the settlement itself is silent." Only on the eve of the fairness hearing, when it became clear that the Jabranis would not be intimidated and withdraw their objections, did CertainTeed agree to make this modification to the settlement.

The Jabranis, for reasons stated at the fairness hearing, disagree that the modification is sufficient to satisfy Third Circuit standards for settlement fairness. But, to the extent this Court correctly approved the settlement, the Jabranis' objection created a benefit of tens of millions of dollars to the class by eliminating a reversion to CertainTeed. "[O]bjectors are entitled to compensation for attorneys' fees and expenses if the settlement was improved as a result of their efforts." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 565 (D.N.J. 2003), *aff'd* 103 Fed. Appx. 695 (3d Cir. 2004). The Jabranis are entitled to fees and an objector incentive for their successful objection.

Thus, pursuant to Fed. R. Civ. Proc. 54, the Jabranis request attorneys' fees and expenses of $140,000 and an incentive payment of $2,000 each.

I. The Jabranis' Objection Improved the Settlement.

The Jabranis' objection noted that the Settlement had no provision for what happened to the remainder of the settlement fund, money that could total in the tens of millions of dollars. There was no provision in the settlement if claims are low, and there is leftover money: who gets it if not the class? Dkt. 50 at 1 & 7-8. While plaintiffs had claimed that the fund is "non-reversionary," nothing in the settlement prohibits the defendant from seeking to recover leftover funds. Plaintiffs cite Settlement ¶ 1.1.dd when they call the fund "non-reversionary" (see Dkt. 87-1 at 9), but nothing in that clause calls the settlement fund non-reversionary.

Most importantly, the parties gave no explanation for what would have happened to the Settlement Fund remainder. Plaintiffs assert that "all of the money will be distributed to the class," (Dkt. 89-1 at 46-47), but they provided no cite to the settlement to demonstrate this. That there is no *cy pres* component simply meant that there would have been tens of millions of dollars left over several years from now with no explanation for who gets it. Plaintiffs' insistence that there was no *cy pres* in the settlement would have judicially estopped them from preventing CertainTeed from reclaiming the leftover settlement funds in 2019.

In response to this objection, the parties, the morning of the fairness hearing, modified the Settlement to ensure that CertainTeed would have no claim on the money, and that class members could continue to access the Settlement fund. Dkt. 109. It is clear that this modification was in response to the Jabranis' objection: the parties could have made this modification at any time, and only did so after abusive depositions attempting to intimidate the Jabranis into dropping their objections, threats of sanctions, and an extraordinary filing filled with *ad hominems* against the Jabranis' counsel. The modification is a material improvement meriting fees.

The general rule governing fee awards to objectors in class action settlement proceedings is that "objectors are entitled to compensation for attorneys' fees and expenses if the settlement was improved as a result of their efforts." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 565 (D.N.J. 2003), *aff'd* 103 Fed. Appx. 695 (3d Cir. 2004); *Rodriguez v. Disner*, 688 F.3d 645, 659 (9th Cir. 2012) (objectors are entitled to attorneys' fees when they confer a substantial benefit on the class). When such a claim is presented, the court should consider whether the efforts of counsel for the objectors "improved the settlement, assisted the court, and/or enhanced the recovery in any discernible fashion." *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PriceWaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 413 (E.D. Wis. 2002).

Courts have awarded fees for improvements far less material than the prevention of the reversion of tens of millions of dollars to the defendant as in this modification. *E.g., Larson v. Sprint Nextel Corp.*, 2010 U.S. Dist. LEXIS 3270, at *98-*105 (D.N.J. Jan. 15, 2010) (awarding fees to objector based on precipitating amended notice), *rev'd on other grounds sub nom, Larson v. AT&T Mobility LLC*, 687 F.3d 109 (3d Cir. 2012); *In re Homestore.com, Inc. Sec. Litig.*, No. C01-11115 MJP (CWx), 2004 U.S. Dist. LEXIS 25234, at *7 (C.D. Cal. Aug. 10, 2004) ("By bringing about re-notice of the class and extension of the due date, [objectors] confer[] a substantial benefit on the class.").

Objectors are entitled to fees even if they benefit only a portion of the class. *See, e.g., Petruzzi's Inc. v. Darling-Delaware Co., Inc.*, 983 F.Supp. 595, 622 (M.D. Pa. 1996) (awarding fees when "[objector's] participation directly led to an increased settlement for fifty percent of the class"); *In re Veritas Software Corp. Sec. Litig.*, No. C-03-0283 MMC, 2006 U.S. Dist. LEXIS 10116 (N.D. Cal. Feb. 24, 2006) (awarding fees to objector for instigating the inclusion previously uncompensated class members in the plan of allocation); *Great Neck*, 212 F.R.D. at 414 (rejecting argument that entire class must benefit in order for objector counsel to get a fee award). And even so, eliminating an ambiguity in the settlement is an entire class benefit in that it makes the settlement "less vulnerable to legal challenge" in the future. *Great Neck*, 212 F.R.D. at 414-15.

More abstractly, objectors assist the settlement process by providing independent scrutiny of a proposed settlement. "Objectors serve as a highly useful vehicle for class members, for the court and for the public generally" in evaluating the terms of a proposed settlement to ensure that it is fair, adequate, and reasonable. *Great Neck*, 212 F.R.D. at 412. Objectors improve the process by reintroducing adversarial criticism at the fairness-hearing stage – the point at which the adversarial relationship between the parties has ended. This adversarial dynamic helps the trial court ensure that the proposed settlement meets the standards of Fed. R. Civ. P. 23. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Litig.*, 55 F. 3d 768, 803 (3d. Cir. 1995) ("where there is an absence of objectors, courts lack the independently derived information about the merits to oppose proposed settlements"). *See also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999) (stating that an award of fees is proper where a lawyer provided a benefit or enhanced the adversarial process); *In re Ikon Office Solutions, Inc., Secs. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (awarding objector $10,000 in fees plus reimbursement of costs for "sharpen[ing] debate").

Given the concrete benefits bestowed upon the class, however, it would be reversible error for this Court to deny a request for fees. *E.g., Gottlieb v. Barry*, 43 F.3d 474, 491 (10th Cir. 1994); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009) (*Rodriguez I*) ("clearly erroneous" for district court to decide that objector counsel "did not add anything").

II. The Jabranis' Fee Request Is Smaller Than Precedent Permits.

While the Jabranis continue to dispute that this modification cured all of the settlement fairness problems, the Court's finding that the resulting settlement is fair is premised upon the finding that the lack of a reversion is a multi-million dollar benefit to the class. The settlement modification ensured that *at least* $20 million (and likely tens of millions of dollars more) that would have reverted to CertainTeed will instead be available for class benefits. Based on the expert report of Theodore H. Frank, we will use the conservative estimate of $3 million as the benefit to the class, though the Jabranis contend, given the claim rate to date, the likely reversion to CertainTeed would have been several times this amount, and the methodology used by class counsel to value the benefit would be much higher than $3 million.

It is reasonable to award fees to objectors based on the percentage of the class recovery resulting from the objection. *Dewey v. Volkswagen of Am.*, No. 07-2249, 2012 U.S. Dist. LEXIS 177844, at *64 (D.N.J. Dec. 14, 2012). Indeed, class counsel argued at length about the appropriateness of percentage of recovery in calculating fees in their fee petition. The appropriate percentage of recovery should be calculated the same way for objectors as for class counsel. *E.g., Lan v. Ludrof,* 2008 WL 763763, at *28 (W.D. Pa. Mar, 21, 2008) (awarding objector 25% of the increase in the benefit to the class); *Prudential,* 273 F. Supp. 2d at 572 (awarding objector same percentage of their share of class recovery as class counsel for their share of class recovery); *Larson,* 2010 U.S. Dist. LEXIS 3270, at *103 (same); *see also In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 468 (D.P.R. 2011) (finding that "10% [of $3 million benefit conferred] is reasonable and appropriate to reflect Objectors' time, effort, ingenuity and success in increasing the kitty for the benefit of the Class."). If the Jabranis requested 17.8% of the $3 million, they would be entitled to $534,000 in fees; even at a 10% rate, they would be entitled to $300,000 in fees.

The Jabranis, however, are only requesting $140,000 in fees and expenses, and another $2,000 each as incentive payments: less than 5% of the $3 million marginal benefit of their objection. This is *per se* reasonable.

A lodestar cross-check shows that this is reasonable, too. The Jabranis' counsel's lodestar—a lodestar that was increased substantially by class counsel's repeated modifications of the settlement, scorched-earth discovery tactics, and abusive filings meriting responses—was $62,862.50, and even this figure excludes dozens of hours spent on the objection and on this fee petition. Jabrani's counsel spent $17,550 on a consulting expert to ensure preservation of appellate issues; and there were $324.95 of expenses, a figure minimized by the lack of travel time by using local counsel to defend a deposition and appear in court.

Attorney	**Hourly Rate**	**Hours**	**Accrued Time Subtotal**
Gary P. Lightman, Esquire	$500	12.70	$6,350.00
Glenn A. Manochi, Esquire	$500	55.80	$27,900.00
W. Lyle Stamps, Esquire	$300	16.50	$4,950.00
Christopher Bandas, Esquire	$350	45.00	$15,750.00
Peter Woods	$375	21.10	$7,912.50
Subtotal			**$62,862.50**
Consulting Expert			
Theodore H. Frank, Esq.	$900	19.5	$17,550.00
Expenses			
Lightman & Manochi			$300.35
Haar & Woods			$24.60
Subtotal			**$17,874.95**
TOTAL			**$80,737.45**

These figures are supported by the declarations of Mr. Manochi, Mr. Bandas, Mr. Woods, and the expert report and declaration of Mr. Frank.

If Mr. Frank is counted as an expense rather than as an attorney-fee, there are $62,862.50 in lodestar fees and $17,874.95 in expenses; the Jabranis would ask for $122,125.05 in fees and $17,874.95 in expenses for a multiplier of just under 2. If Mr. Frank is counted as attorney fees, the Jabranis ask for $139,675.05 in fees and $324.95 in expenses, for a multiplier of under 1.75. Class counsel asked for and received a multiplier of 2.6, and are judicially estopped from claiming that this multiplier request is not reasonable.

III. The Jabranis Are Entitled to Incentive Payments.

The Jabranis, who maintained their successful objection through threats and depositions, request a reasonable $2,000 incentive payment for each of them.

A. Successful objectors are entitled to incentive payments.

It is appropriate to award objectors incentive awards just as class representatives receive incentive awards. *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 816-17 (N.D. Ohio 2010); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-05208-JF, 2011 U.S. Dist. LEXIS 52685 (N.D. Cal. May 17, 2011).

By objecting, the Jabranis exposed themselves to harassing discovery and private investigation from the plaintiffs' attorneys; they faced vitriolic personal attacks and threats of sanctions. As the Frank Declaration details, many potential objectors genuinely upset with abusive class-action settlements have declined to object when informed of these risks. Class members have little incentive to object and jump through hoops and hurdles erected by the settling parties. Thus, it is no surprise that the predominating response will always be apathy. *See Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey that found between 42% and 64% of settlements engendered no filings by objectors). Just as class representatives receive incentive payments, so should objectors whose objections meaningfully contribute to class recovery. Because the Jabranis came forward, the class will receive millions of dollars they would not have, and tens of millions of dollars that would have reverted to CertainTeed will not.

B. Class counsel improperly used depositions to attempt to intimidate the Jabranis.

As the attached deposition transcripts show, class counsel used the deposition process not to elicit discoverable information under Rule 26(b)(1), but to attempt to intimidate the Jabranis into dropping their meritorious objections.

At the deposition of Janet Jabrani, class counsel

a. Asked the witness if she was "concerned" that lawyer (Mr. Bandas) was not at the deposition (J. Jabrani Depo. at p. 16, Manochi Declaration, Ex. 2);

b. Asked if witness was happy with her lawyer even though her counsel has been criticized in other cases (*id.* at 98-99, 110-122);

c. Asked the witness if she wished she had had more information about her lawyer before hiring him and knew more about his history (*id.* at.99-103, 104-105, 109-114);

d. Offered to send documents to the witness directly that supposedly impugn counsel (*id.* at.99-100);

e. Suggested to the witness that counsel's conduct was improper because he represented objectors in other cases and suggested it was improper to represent objectors in this case (*id.* at.99-102);

f. Told the witness Class Counsel was pursuing sanctions against her (*id.* at. 100, 119-120);

g. Falsely told the witness that her counsel has "abandoned" clients in past objections (*id.* at. 104);

h. Falsely told the witness her counsel had left a client at a deposition (*id.* at. 104);

i. Falsely told the witness that her lawyer had been held in contempt in the *Chinese Drywall* litigation (*id.* at. 104);

j. Suggested to the witness that she would have to post a bond in this case in excess of $500,000 and asked her if she was willing to pay it (*id.* at. 105);

k. Asked a lay witness hypothetical and threatening questions about having to pay a large bond (*id.* at p. 106);

l. Impugned her lawyer based on pleadings from another case and suggested to the witness that counsel's motives were improper in this case (*id.* at. 107-111);

m. Falsely suggested that none of counsel's prior work had resulted in benefit to class members (*id.* at.115)

n. Threatened to post the witness' name on a settlement website (*id.* at. 116)

o. Threatened that the Court would make her appear in Pennsylvania and incur attendant expenses and sanctions (*id.* at. 120-122)

At the deposition of Ali Jabrani, class counsel

a. Threatened to post the deponent's name on the settlement website (Ali Jabrani Depo. at 64, Manochi Declaration, Ex. 3);

b. Misrepresented the circumstances under which Mr. Arfaa withdrew as local counsel and falsely told the witness (without establishing any foundation or basis) "he withdrew based on Mr. Bandas' history as a serial objector" (*id.* at 68).

c. Made comments to the witness (barely in question form) impugning his lawyer (*id.* at 68);

d. Read orders and pleadings from other cases in which Mr. Bandas participated simply to ask the witness repeatedly if he was "concerned" about his lawyer or the particulars of other, unrelated cases (*id.* at 70-77, 80-87);

e. Without basis or foundation for the amount, Class Counsel suggested to the witness multiple times in the deposition that he would have to post a $400,000 bond, suggested that the Court would order that amount, and asked if he could afford that bond (*id.* at 77, 78, 79, 81)

f. Repeatedly asked the witness if he was aware that class counsel is seeking sanctions against the witness and his counsel (*id.* at 85, 87, 88, 89);

g. Told the witness that other lawyers were seeking sanctions against Mr. Bandas in another case (*id.* at 187-88);

h. Threatened the witness that class counsel was seeking to bring the witness before the Judge in Pennsylvania and incur out-of-pocket expenses for doing so (even though counsel should have known there is no subpoena power to compel the witness to travel from St. Louis to Philadelphia) (*id.* at 90-91); and

i. Questioned the witness about documents and refused the witness' request to see the documents before answering the question (id. at 163, 165).

Rule 26(b)(1) limits discovery to those things that are reasonably calculated to lead to the discovery of admissible evidence. Class Counsel's direct threats to these witnesses about sanctions, bad-mouthing their lawyer, threatening them with expenses and travel disallowed by rule, representing that $400,000 bond orders will be charged against them and repeatedly asking the witness "how they feel" about their lawyer is not relevant to any claim or defense. Those "questions" have a single purpose: harassment.

Of course, "[n]o one expects that the deposition of a key witness in a hotly contested case to be a non-stop exchange of pleasantries." *Freeman v. Schointuck*, 192 F.R.D. 187, 189 (D. Md. 2000). But as the United States District Court for the Southern District of Ohio observed:

> As officers of the court, counsel are expected to conduct themselves in a professional manner during a deposition.... A deposition is not to be used as a device to intimidate a witness or opposing counsel so as to make that person fear the trial as an experience that will be equally unpleasant, thereby motivating him to either dismiss or settle the complaint.

Ethicon Endo-Surgery v. U.S. Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995) (emphasis added) (cited in *Landers v. Kevin Gros Offshore, L.L.C.*, Civ. No. 08-1293-MVL-SS, 2009 WL 2046587, at *1 (E.D. La July 13, 2009) (finding that imposing a sanction for improper deposition questioning is "otherwise congruent with FED. R. CIV. P. 26(g).")).

Moreover, "accusations of wrongdoing against witnesses and attorneys have no place in a deposition." *Ethicon Endo-Surgery*, 160 F.R.D. at 99.

A deposition conducted in an "unproductive and harassing manner" is undoubtedly sanctionable." *In re Rimstat, Ltd.*, 212 F.3d 1039, 1047 (7th Cir. 2000); *see also Morse v. S. Pac. Transp. Co.*, 42 F.3d 1401 (Table), 1994 WL 650047, at *1 (9th Cir. 1994) (finding attorney's behavior "clearly sanctionable" under FED. R. CIV. P. 26(c) where he was argumentative and "badger[ed] the witness through dozens or pages of transcript"); *Sassower v. Field*, 973 F.2d 75 (2d Cir. 1992) (affirming order of sanctions under FED. R. CIV. P. 11 and 28 U.S.C. § 1927, where attorney's conduct included "incredibly harassing depositions" and "abusive questioning" of defendants); *Heinrichs v. Marshal & Stevens Inc.*, 921 F.2d 418, 420 (2d Cir. 1990) (affirming award of sanctions under FED. R. CIV. P. 37(a)(4) and 26(c) where counsel's questioning of witnesses "was often improperly argumentative and confrontational"); *Carroll v. The Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 293-94 (5th Cir. 1997) (sanctions imposed based on abusive conduct during deposition); *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1033 (5th Cir.1990) (finding entirely appropriate the court's expectations of a heightened standard of conduct by a litigant who is also an attorney).

The purpose of those depositions was not to obtain evidence relevant to this case, but to harass the objectors. Nevertheless, the Jabranis maintained their objection. An incentive payment is appropriate.

CONCLUSION

For the foregoing reasons, the Jabranis request $140,000 in attorneys' fees and expenses, and $2,000 each in incentive payments.

DATED: April 3, 2014

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